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P. Bryan Fishburn; attorney for appellee.
Robert W. Hughes; attorney for appellants.

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IN THE SUPREME COURT OF THE STATE OF UTAH

TOM WATKINS, an individual Respondent/Appellee, vs. HENRY DAY FORD, a Utah corporation, Defendant/Appellant.	REPLY BRIEF OF APPELLANT Supreme Court No. 20100802-SC

APPEAL FROM THE OPINION OF THE
COURT OF APPEALS FOR THE STATE OF UTAH
FOLLOWING THE GRANT OF CERTIORARI

REPLY BRIEF OF APPELLANT ON THE UTAH SUPREME COURT'S GRANT OF CERTIORARI ON THE UTAH COURT APPEAL'S REVERSAL AND REMAND, 2010 UT APP 243

P. BRYAN FISHBURN, ESQ. (4572)
P. Bryan Fishburn, P.C.
4505 South Wasatch Blvd., Suite 215
Salt Lake City, Utah 84124
Telephone: (801) 277-3445
Fax: (801) 277-0333
Attorney for Respondent/Appellee, Tom Watkins

ROBERT W. HUGHES (1573)
438 East 200 South
Salt Lake City, Utah 84111
Telephone: (801) 364-9075
Fax: (801) 364-9081
Attorney for Petitioner/Appellant
Henry Day Ford

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Salt Lake City, Utah 84124
Telephone: (801) 277-3445
Fax: (801) 277-0333
Attorney for Respondent/Appellee Tom Watkins

ROBERT W. HUGHES (1573)
438 East 200 South
Salt Lake City, Utah 84111
Telephone: (801) 364-9075
Fax: (801) 364-9081
Attorney for Petitioner/Appellant
Henry Day Ford

I. PARTIES

Respondent/Appellee: Tom Watkins, an individual

Petitioner/Appellant: Henry Day Ford, a Utah corporation

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RESPONSE TO WATKINS' STATEMENT OF THE NATURE OF THE CASE

Both Appellee Tom Watkins ("Watkins") and Appellant Henry Day Ford, Inc. ("HDF") acknowledge that the obligation of HDF to sell Watkins a Ford GT40 "was subject to the condition precedent" that it had a Ford GT40 to sell to Watkins.

With regard to the application of the condition precedent, Watkins cited, Commercial Union Associates v. Clayton, 863 P.2d 23 (Utah App 1993). Watkins, however, failed to address all of the Court's discussion of the Commercial decision relevant to a condition precedent.

It is relevant to observe the Court in Commercial additionally held:

> **A meeting of the minds between contracting parties is essential to the formation of any contract**: A condition precedent to the enforcement of any contract is that **there be a meeting of the minds of the parties, which must be spelled out, either expressly or implicitly, with sufficient definiteness to be enforced.** (Cited cases omitted.) (Emphasis added.)

The Court continued:

> A condition precedent is one which must be performed by the one party to an existing contract before the other party is obligated. (Citations omitted) **Courts must respect express conditions precedent. Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced "in accordance with the intentions as ... manifested by the language used by the parties to the contract."** (Citations Omitted).

Watkins went to HDF and specifically asked to purchase a GT40 (Watkins Testimony, Trial Transcript ("TT") 44:15-16). The Contracts that Watkins signed reflected only the name "GT40" without further clarification or additional detail. (Watkins Testimony, TT 47:9-11). The Trial Court found at Finding of Fact ¶11:

It is undisputed that plaintiff specifically requested that defendant sell him a Ford GT40 automobile and plaintiff's request was specifically referenced in the Contracts which were executed by plaintiff and defendant.

At the time of the signing of the Contracts, there was a meeting of the minds only regarding the Ford GT40, which was a vehicle model that Ford had manufactured and a model which Ford could introduce in the future.[1] HDF has never had a GT40 available to sell to Watkins (Day Testimony, TT 139:2-3), and, therefore, the condition precedent has not occurred. As such, HDF cannot be in breach of the Contracts.

Watkins continues "This case is, in some respects, similar to Koenen v. Royal Buick Co. 162 Ariz 376, 783 P2d 822 (Ariz App. 1989)". (Watkins Brief ("WB"), pg. 9.) The dissimilarities, however, between these cases cause Koenen not to be instructive or even helpful in deciding this case. Koenen and the present case address vehicle sales contracts for limited edition vehicles and in both cases the dealerships were uncertain at the time the contracts were formed whether the subject vehicles would be available for them to sell. In Koenen, Royal (the dealership), inquired from General Motors whether it would be allocated a "GNX" vehicle. A few months later Royal was notified that it would be allocated a GNX. Royal, however, mailed a letter to Koenen informing him that it would not be able to sell him a GNX. The letter included a check in the amount of Koenen's $500 deposit. Koenen declined to cash the check. In this case, HDF inquired from Ford, nine (9) months after it accepted Watkins' deposit, whether it would be allocated a GT40. HDF was advised that it was not likely to be allocated a GT40. After receiving notice from Ford, HDF notified

[1] Jeremy Day testified: "Q: So, is it possible that Ford could yet come out with another GT40? A: Absolutely." (Day Testimony, TT 138:21-23.) Watkins also testified: "Q: Isn't it possible, sir, that Ford could also in the future manufacture, produce a Ford GT40? A: I guess anything is possible".

Watkins, in a letter, that it would not be allocated a GT40 and returned Watkins' deposit[2]. Watkins, unlike Koenen, promptly deposited the check into his account. Koenen prepared a protest letter and sent it to Royal. Watkins failed to contact HDF in any fashion upon the return of his deposit. (Watkins Testimony, TT 80:7-9.)

In, Koenen, the subject vehicle was physically delivered to Royal within a few months of the contract. In this case, HDF was not notified that it would receive a Ford GT until years after the contracts were signed. HDF submits that it is commercially unreasonable to require HDF to be bound by Contracts over two (2) years after the deposit and consideration for the Contracts had been returned to and accepted by Watkins.

RESPONSE TO WATKINS' "STATEMENT OF FACTS"

Watkins does not dispute the Statement of Facts presented in HDF's initial Brief. HDF will respond only to those portions of Watkins' Statement of Facts ("Watkins Facts") which HDF believes require clarification or correction. Watkins' Facts are not set forth in numbered paragraphs. Accordingly, HDF's only references are the page numbers on which the disputed facts are located .

1. At page 3 of Watkins' Facts, Watkins states:

> Watkins inquired if Henry Day Ford might be allocated any Ford GT40s and, if yes, would it sell him [Watkins] one? Watkins Tr. 4-21. Kersey replied that Henry Day Ford might be allocated one,

[2] Jeremy Day testified: Q. Going back to when you wrote the letter and had the check prepared to the plaintiff, did you believe that you were -- held his deposit for a reasonable time? A. Yes. Q. Have you often held a check for eight or nine months on deposit? A. Not that I can recall. Q. In fact, this was unusual – A, Absolutely. Q. – that you held it longer than usual. Is that correct? A. Absolutely, yea." (Day Testimony, TT 141:12-23).

> perhaps two GT40s, although it was not certain it would be allocated any. Kersey indicated that if Ford allocated and delivered to it any GT40s, it was willing to sell them to Watkins. Watkins Tr. 46:6-13.

Steve Kersey, an employee of HDF, did not indicate to Watkins that HDF "might be allocated one, perhaps two GT40s". Mr. Kersey testified that when Watkins inquired as to whether HDF would sell him a GT40, Mr. Kersey told Watkins that "at that time I did not know whether we were going to be allocated anything". (Kersey Testimony, TT 111:23-24.)

2. At page 4 of Watkins' Facts, Watkins accurately states that each "Contract specified a down payment in the amount of $1,000.00". It is important to note that the $1,000.00 was paid by Watkins to HDF as consideration for HDF entering into the Contracts, and to "secure the deal". (Watkins Testimony, TT 77:24.)

ARGUMENT

POINT I: THE APPELLATE COURT ERRED IN NOT STRICTLY LIMITING ITS REVIEW TO THE TRIAL COURT'S PROPER INTERPRETATION OF THE PARTIES' CONTRACTS.

A. Watkins references Shakespeare's quotation: "What's in a name?" and then asks the question, "What is a name? That is the question". (WB, pg. 13.) The answer is: "A word or phrase identifying or designating a person or thing and distinguishing that person or thing from others." (Black Law Dictionary, 7th Ed., pg. 1043.) Certainly the name "Ford GT40" does not mean a Ford Focus, or other vehicle model. To suggest a specific noun does not identify a particular person or thing is nonsense.

In this case, it is undisputed that Watkins asked to purchase from HDF a specific thing –

a "Ford GT40". Watkins, at trial, described the Ford GT40 as "[b]eautiful. The car was iconic. The car was widely acclaimed and famous". (Watkins Testimony, TT 39:6-7.) Watkins entered into two (2) Contracts with HDF to purchase only the named and specific referenced "beautiful, iconic, widely acclaimed, and famous" GT40. Watkins acknowledges: "Both Contracts identified the motor vehicle covered by the Contracts to be a new Ford GT40". (WB, pg. 14; Watkins' Facts, pg. 3-4).

Watkins argues that the Ford GT40 was merely a name for a 'concept car' and that the name morphed to the Ford GT. This argument fails for several reasons:

First, Watkins, as noted, asked to purchase a vehicle that he acknowledged existed, or could in the future be manufactured.

Second, Watkins stated in his Brief: "At the 2002 North American International Auto Show in Detroit, in January 2002, Ford Motor Company unveiled the Ford GT40 concept car, which was based on the Ford GT40 that Ford had built and successfully raced in the mid -1960's at LeMans." (WB pg. 2; see also, Watkins Testimony, TT 38:20-39:16; 54:9-17; Defendant's Trial Exhibit 12.) Watkins asked to buy an identifiable vehicle by using an exact name. The vehicle requested by Watkins was then referenced in the Contracts. Watkins knew that the Contracts had to be completed accurately. (Watkins Testimony, TT 69:17-19.)

Third, Watkins did not ask to purchase the 'Ford GT40 concept car' or the 'car unveiled at the 2002 North American Auto Show'. In fact, at no time during the trial did Watkins personally ever utter the word "concept" with reference to a vehicle.[3] The trial transcript is devoid of any

[3] The word "concept" is cited ten (10) times in the trial transcript. One (1) time, "concept" is referenced in Steve Kersey's testimony and nine (9) times, "concept" is referenced in Jeremy Day's testimony. No where at trial did Watkins use the word "concept" to describe the car he wanted.

reference by Watkins that he requested a 'concept car' or the 'vehicle unveiled at the 2002 North American International Auto Show'.

Fourth, HDF submits that Watkins' actions support the conclusion that he only wanted to purchase a GT40. Watkins as an experienced automobile dealer appreciated that the Contracts could be amended or modified. (Watkins Testimony, TT 34:23-24; 70:24-25; 71:1.) In fact, the day after the Contracts were signed, Watkins called HDF and asked that the Contracts be amended to include the sales price as "MSRP", a request which HDF accommodated. Watkins testified that he followed "these cars [GT40] for years". (Watkins Testimony, TT 91:3.) Trial Exhibit 12 which references the Ford GT was published in June 2003. Yet, Watkins testified:

> Q. And was there a time when you found out that it was going to be the Ford GT?
> A. Yes.
> Q. Okay. And did you call Henry Day?
> A. No.

(Watkins Testimony, TT 75:8-12.). Watkins' failure to amend the Contracts to reference the Ford GT when he knew the name was changed shows that Watkins contracted for and wanted a GT-40.

B. Utah law clearly directs that a contract which is not ambiguous be enforced as written. In South Ridge Homeowners' Ass'n v. Brown, 226 P.3d 758, 2010 UT App 23 (Utah App., 2010) the Court of Appeals held:

> Accordingly, our interpretation of the relevant provisions is limited to the four corners of the CC&Rs, and we of course interpret the relevant language in light of the overall meaning and intent of the CC&Rs. See Bodell Constr. Co. v. Robbins, 2009 UT 52, ¶ 19, 215 P.3d 933 ("When we interpret a contract, . . . we determine the intent of the contracting parties by first look[ing] to the writing alone. If the writing is unambiguous, we determine the intent of the parties exclusively from the plain meaning of the contractual language.") (alteration in original) (citation footnotes and internal quotation marks omitted).

1. The Court of Appeals erred in the interpretation of the Contracts.

Watkins states at page 14 of his Brief: "Watkins testified at trial that the vehicle he had agreed to buy, when he signed the Contracts, was"the car known at the time as the Ford GT40 and the car that Mr. Kersey and I both described at the time as being the Ford GT40". (Watkins Testimony, TT 72: 9-13.) HDF submits that this statement is inaccurate. Mr. Kersey testified:

> Q. . . . [d]id Mr. Watkins ask specifically for a Ford GT40?
> A. He did.
> Q. And is that what's represented in the contracts your prepared?
> A. It is.
>
> Q. And that is your understanding of what Mr. Watkins wanted?
> A. Yes.

(Kersey Testimony, TT 117:18-23; 118:6-8.)

This Court recently held in Selvig v. Blockbuster Enterprises,, 2011 UT 39 ¶23 (Utah 2011):

> In construing a contract, the intention of the contracting parties is controlling "In interpreting a contract, we look to the writing itself to ascertain the parties' intentions, and we consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none. ("When determining whether the . . . language is ambiguous, we attempt to harmonize all of the contract's provisions and all of its terms." "If the language of the contract is unambiguous, the intention of the parties may be determined as a matter of law based on the language of the agreement." If, however, the language is found to be ambiguous, the court may consider extrinsic evidence of the parties' intentions. To determine whether contractual language is ambiguous, the court may consider any relevant evidence so that it can place itself in the same position as the parties **at the time the contract was entered**. A finding of ambiguity is justified only if, after reviewing all of the evidence, "the competing interpretations are reasonably supported by the language of the contract." (Internal quotation marks omitted). (Emphasis added)

In this case, it is clear that the intention of the parties was for HDF to sell, and for Watkins to purchase, a GT40.

2. The Appellate Court also erred in its standard of review of the interpretation of the Contracts. This Court also held in Selvig at ¶18:

> A contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent." When a district court "interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard." . ***But if the district court "proceeds to find facts respecting the intentions of the parties based on extrinsic evidence, then our review is strictly limited."*** (Internal quotation marks omitted) (Emphasis added.)

The Contracts are clear and unambiguous. If there was an ambiguity, it was a 'latent' ambiguity because of a purported name change by Ford. The Trial Court heard the testimony regarding the Contract formation and admitted Exhibit 12, the June 2003 press release. The Trial Court considered the alleged ambiguity and the intentions of the parties and then specifically found:

> **It was undisputed that plaintiff specifically requested that defendant sell him Ford GT40 automobiles and plaintiffs' request was specifically referenced in the Contracts which were executed by the plaintiff and defendant.** (Emphasis added.)
>
> Plaintiff reviewed the Contracts which specified that the automobile to be purchased by plaintiff was a Ford "GT 40", found them to be accurate, and signed both written Contracts, as did Mr. Kersey on behalf of defendant.

(Trial Court Findings of Fact ¶¶, 11, and 13.)

The Trial Court concluded:

> The Contracts provided that defendant was to sell to plaintiff a "Ford GT 40".
>
> The Contracts specifically provide that plaintiff contracted to purchase two (2) "Ford GT 40" automobiles. Plaintiff claims that he contracted to purchase Ford GT automobiles which claim differs from the actual Contracts.

(Trial Court Conclusions of Law ¶¶4, 6.)

As a matter of law, the Appellate Court's inquiry should have been strictly limited because of the Trial Court's findings regarding the intentions of the parties based on extrinsic evidence. This Court held in Kimball v. Campbell, 699 P.2d 714 (Utah 1985) the strict limitation inquiry involved:

> ***If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard. However, if the contract is not an integration or is ambiguous and the trial court proceeds to find facts respecting the intentions of the parties based on extrinsic evidence, then our review is strictly limited.*** (Emphasis added.) (Citations omitted.)
>
> [T]his Court is obliged to review the evidence and all inferences that may be drawn therefrom in a light most supportive of the findings of the trier of fact. The findings and judgment of the trial court will not be disturbed when they are based on substantial, competent, admissible evidence. (Citations omitted).

Notwithstanding the evidence and testimony at trial and the Findings of Fact and Conclusions of Law entered by the Trial Court, the Court of Appeals reversed the Trial Court by finding a latent ambiguity, which was outside the appropriate standard of review of the Appellate Court in this case.

3. In the present case, the Trial Court concluded that the "Contracts are clear and unambiguous and were intended to be the final and complete expression of the parties' bargain" and that the "Contracts between the parties are integrated agreements". (Trial Court Conclusions of Law ¶¶1, 2.) The Appellate Court agreed with the Trial Court that "there exists no facial ambiguity in either of the contracts at issue here". The Appellate Court, however, found that there is a latent ambiguity in the contracts at issue here, created by Ford's later decision

to name the anticipated car the GT instead of the GT40. (Appellate Court Decision ¶¶14, 16.)

First, even if there was an ambiguity, parol evidence that explains the parties' intent cannot contradict the terms of the written contract. Novell, Inc. v. The Canopy Group, Inc., 2004 UT App 162,92 P.3d 768 (Utah App., 2004) (where a binding agreement exists, whether completely or partially integrated, evidence of prior or contemporaneous agreements or discussions is not admissible to contradict terms of the written agreement.); State Bank of Lehi v. Woolsey, 565 P.2d 413, 418 (Utah 1977) (parol evidence . . . will not be received for the purpose of varying or adding to the terms of the written agreement).

The Appellate Court was correct in its holding that "[w]hen the parties chose the term GT40, it was unambiguous and meant that, the parties were contracting for the sale of what was then known as the GT40." (Appellate Court Decision ¶14.)

The Appellate Court, however, continued opining that the perceived ambiguity of the meaning of the Ford GT40 developed later, when Ford decided to name the anticipated car the Ford GT. (Appellate Court Decision ¶16.) In the Appellate Court's holding, this re-naming of the vehicle created a latent ambiguity that demanded extrinsic evidence, in order to determine what the parties meant by their reference to the term "GT40". (Appellate Court Decision ¶¶ 15, 16.) However, this is where the Appellate Court, and Watkins, err in their analysis. HDF asserts that when a latent ambiguity does exist it is necessary to receive evidence of what each party subjectively thought **at the time of contracting**, certainly not years later. Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (Utah 1995). *See also,* Restatement (Second) of Contracts §212 & cmt. b (1979); Corbin §579; C.R. Anthony Co. V. Loretto Mall Partners, 112 N.M. 504, 508-09, 817

P.2d 238, 24243 (1991) ([r]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties . . . so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting'.)

The latent ambiguity situation is unique and requires that the courts look to the subjective intention of the parties, rather than the later perceived facts. Again, it is necessary to receive evidence of what each party subsequently ***thought at the time of contracting***, to determine if a latent ambiguity exists. Id. If there is a latent ambiguity then there is no contract because the evidence is undisputed that there was no meeting of the minds as to the subject of the Contracts. *See*, Commercial Union Associates v. Clayton, 863 P2d 23 (Utah App 1993). *See also*, Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864) (Each parties' subsequent expression of the ship indicated to the court that they did not intend the same ship at the time of contracting, and therefore there was no contract.)

POINT II: THE APPELLATE COURT ERRED IN CONCLUDING THAT WATKINS DID NOT WAIVE OR ABANDON HIS RIGHTS UNDER THE CONTRACTS.

The Trial Court found the facts established a waiver and/or abandonment of the Contracts by the parties.

A. The totality of facts justified the finding by the Trial Court that Watkins had waived his rights under the Contracts. This Court held in Soters Inc. v. Deseret Federal Saving & Loan, 857 P2d 935, 942 (Utah 1993):

> We further clarify that the intent to relinquish a right must be distinct. Under this legal standard, **a fact finder need only determine whether the totality of the circumstances "warrants the inference of relinquishment".** (Emphasis added.)

In the case of Kenny v. Rich, 2008 UT App 209, ¶ 18, 186 P.3d 989, the Utah Court of Appeals held:

> Whether a party has effectuated a waiver is a mixed question of law and fact. Thus, "we `grant broadened discretion to the trial court's findings' when reviewing questions of waiver." (Citations omitted.)

(See also red Cliffs Corner v JJ Hunan, 2009 Ut App 240 ¶15.)

The Appellate Court's decision to reverse the Trial Court is contrary to the totality of the facts. Further, the Appellate Court's decision is a departure from well-established law and creates uncertainty and confusion, For these reasons, the Appellate Court should be reversed.

B. The Appellate Court incorrectly applied the law of waiver to Watkins' knowledge and actions under the Contracts. It is fundamental that where parties have rights under an existing contract they have exactly the same power to renegotiate terms or to waive such rights as they had to make the contract in the first place. Davis v. Payne & Day, Inc. 10 Utah 2d 53, 348 P.2d 337 (1960). As a consequence, under Utah law, waiver can operate to prevent a party from demanding strict compliance with a contract when the parties have waived their rights. The undisputed facts establish that Watkins waived the formal requirements of the Contracts.

The Appellate Court incorrectly held that "there was simply no relinquishment by Watkins of a known right in this case". (Appellate Court Decision ¶ 17.) The Appellate Court based its decision on the theory "that there is simply no evidence whatsoever indicating that Watkins knew he still had rights under the Contracts at the time he negotiated the check concerning his deposit." (Appellate Court Decision ¶ 18.) The Appellate Court's conclusion is inconsistent with the undisputed facts of the case.

> A person makes a knowing and intelligent waiver when that person knows that a right exists and has adequate knowledge upon which to make an intelligent decision. Waiver requires a knowledge of the facts basic to the exercise of the right waived, with an awareness of its consequences.

28 Am.Jur.2d, *Estoppel and Waiver* §2002 (2002) .

With regard to the deposit paid by Watkins at the time he entered into the Contracts, Watkins specifically testified that the deposits were part of the Contracts

> Q. ...[Y]ou and Mr. Kersey agreed to the thousand dollars [deposit for each GT40]?
> A. Yes.
> Q. And the thousand dollars was part of the contract [Trial Exhibits D—D4], correct?
> A. Yes.
>
> Q. Well that deposit was important, was it not sir?
> A. "Yes".
>
> Q. Did you call Henry Day and say, "Keep my check?
> A. No.
> Q. Did you call to object to them returning it to them – to you?
> A. No.

(Watkins Testimony TT 78:20-25; 79:21-25; 80:5-9.)

Watkins accepted his deposit back, knowing it was an important part of the Contracts, without objection, and without inquiry about the status of the President's Award. Watkins' conduct in not contacting Henry Day Ford about the return of his deposit or for any other reason prior to June 2005 demonstrated Watkins' waiver of his rights under the Contracts.

In Soter's this Court held:

> A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. (Citations omitted.) We further clarify that the

> intent to relinquish a right must be distinct. Under this legal standard, a fact finder need only determine whether the totality of the circumstances "warrants the inference of relinquishment." (Citations omitted.) Such a flexible approach is particularly important because waiver is a term which has various meanings depending on the facts and the context in which it is used. 92 C.J.S. Waiver 1041 (1955).

Waiver has three elements, the third of which is "an intention to relinquish the right." Id. at 940. Here, Watkins had the existing right to purchase two Ford GT40s, if HDF had been allocated a Ford GT40. As to this third element, Watkins argues that he did not intend to waive his rights under the Contracts when he negotiated the return of his check. Watkins knew of his rights under the Contracts, yet he intentionally and distinctly relinquished those rights as shown by his accepting the return of his deposit. In fact, there is not one event presented by Watkins that even infers that he did not intentionally and distinctly waive enforcement of the Contracts.

Watkins argues in his Brief that the fact that he was an experienced car dealer is irrelevant as to whether he knew of his rights under the Contracts. However, under Utah law, sophisticated business parties are charged with knowledge of the terms of the contracts that they enter into. ASC Utah, Inc. v. Wolf Mountain Resorts, 245 P.3d 184 (2010). Thus, when a party like Watkins enters into a standard vehicle purchase contract, he

> [i]s not permitted to show that [he] did not know its terms, and in the absence of fraud or mistake [he] will be bound by all its provisions, even though [he] has not read the agreement and does not know its contents.

Semenov v. Hill, 1999 UT 58, ¶ 12, 982 P.2d 578. As a sophisticated business party, Watkins is charged with the knowledge of all potential rights under the Contracts, and this certainly should be considered in determining whether he could waive those rights.

This Court noted in Soter's, that in Utah, a distinct intent to waive may only be shown by a preponderance of the evidence. Id. at 942, n. 6. Watkins' waiver of his rights were distinctly made when he deposited the return of his deposit because, as mentioned above, he was aware of the deposit's importance to the Contracts.

This Court held in United Park v. Stichting Mayflower, 140 P.3d 1200 ¶21, 2006 UT 35 (Utah, 2006):

> Whether a party has effectuated a waiver is a mixed question of law and fact. (Cited cases omitted) "[W]hether the trial court employed the proper standard of waiver presents a legal question which is reviewed for correctness, but the actions or events allegedly supporting waiver are factual in nature and should be reviewed as factual determinations." **Accordingly, we "grant broadened discretion to the trial court's findings" when reviewing questions of waiver**. (Emphasis added.)

Watkins testified that "[he] did discuss and other dealers were aware of the Presidents Award". (Watkins Testimony TT 102:23-25; 103:1-8; 104:24-25; 105:1-5.) Watkins also testified that he and Steve Kersey discussed the President's Award in his first meeting at HDF. Watkins testified:

> Q But you never discussed that [the President's Award with Mr. Kersey [the Henry Day sales person], did you sir?
> A. We did talk about the President's Award.
>
> ....All I [Watkins] know is as I was calling dealers from Ogden down to Provo, **they made me aware of a President's Award and that in some way that figured into the allocation**.
> Q And when did that happen, sir? When did they tell you that?
> A In March of '02. (Emphasis added.)

(Watkins Testimony, TT 103:6-8; TT 104:24-25; 105:1-5.)

Watkins by his testimony recognized that he still had rights under the Contracts because

he knew that the allocation of the Ford GT40s was based on the Presidents Award, and that HDF was not assured an allocation.[4]

The Trial Court specifically held: "Plaintiff [Watkins], by his actions, unequivocally demonstrated his intent to relinquish his rights to purchase the subject vehicles from defendant [HDF]". (Findings of Fact ¶41.) The Trial Court concluded at its Conclusions of Law ¶10:

> Plaintiff's acceptance of the return of his deposit and his subsequent inaction clearly demonstrate plaintiff's voluntary relinquishment of his known rights particularly with plaintiff's experience in the auto dealership industry and both parties' uncertainty as to when and if defendant would receive the contracted vehicles.

In Ahrendt v. Bobbitt, 119 Utah 465, 229 P.2d 296, 297 (1951), this Court held:

> A party to a contract, who is entitled to demand performance of a condition precedent, may waive the same, either expressly or by acts evidencing such intention; and performance of a condition precedent to taking effect of the contract may be waived by the acts of the parties in treating the agreement as in effect.

See also, Caldwell v. Anschutz Drilling Co., 13 Utah 2d 177, 369 P.2d 964, 966 (1962) (cited with approval in Lone Mountain Prod. Co. v. Natural Gas Pipeline Co. of Am., 984 F.2d 1551, 1557 (10th Cir.1992)).

In Geisdorf v. Doughty, 972 P.2d 67, 73 (Utah 1998), the Utah Supreme Court held:

> [M]ere silence is not a waiver unless there is some duty or obligation to speak. It is generally accepted that a duty to speak will not be found where the contracting parties' deal at arm's length and where the underlying facts are reasonably within the knowledge of both parties. Under such circumstances, the plaintiff is obliged to take reasonable steps to inform himself and to protect his own interest.

Watkins did not take the reasonable steps under Geisdorf to inform himself or protect his

---

[4] Q. In your conversations with Mr. Kersey, did you understand Henry Day Ford would definitely receive one of these automobiles? A. No. (Watkins Testimony, TT 45:15-18.)

interests. Watkins should have contacted HDF to determine whether he would like HDF to continue to hold his checks, but he did not. Watkins rather deposited the check and forgot about the Contracts until 2005. Clearly, Watkins' actions were inconsistent with the Contracts.

Watkins asserts that "a person cannot waive a right before he or she is in position to assert it." (Quoting 28 Am.Jur.2d *Estoppel and Waiver* §201(2000).) Watkins claims that he could only assert his right, i.e. to purchase the vehicles, when the vehicles had been allocated and delivered. However, Watkins was, at all times during the Contracts, able to assert his rights under the Contracts, not just when the vehicles were delivered. Watkins could have asserted his rights under the Contracts when his deposit was returned to him, by contacting HDF and not cashing the check, if his intention was to maintain those rights.

HDF asserts that the facts indicate an unequivocal intent on Watkins' part to relinquish any right he had under the Contracts, thus constituting waiver as a matter of law.

C. The Appellate Court erred when it provided in the footnote of its Decision that HDF's good faith representation and return of Watkins' check was irrelevant. Watkins argues that the Appellate Court did not err when it provided that "whether Henry Day was acting in good faith by making an educated guess [about whether it would be allocated a GT40] was irrelevant..." (Appellate Court Decision ¶19 n.7.) "Further, notwithstanding any good faith, the unequivocal statement from HDF was simply incorrect." (Id.) The "statement" which Watkins is referring to here is contained in HDF's December 31, 2002 letter to Watkins:

> [e]nclosed please find a check for the refund of deposit on your vehicle order. We regret to inform you that our allocation is not going to allow us to receive this vehicle.

HDF asserts that the Appellate Court erred because the statement by HDF was more than an "educated guess" it was commercially reasonable under the circumstances, i.e. HDF having never won a major Ford award that would have precipitated an allocation of a Ford GT40 in its 40 year history. Nevertheless, Watkins' claims the representations made by HDF in the letter dated December 31, 2002 were false. The letter was based on HDF's good faith efforts in contacting Ford to determine if they would be allocated any Ford GT40s without winning the President's Award or Share of the Nation Award. (Trial Court Findings of Fact ¶¶24, 25.) It cannot be disputed that at the time the letter was sent to Watkins (December 31, 2002), the statement contained therein was true and accurate based upon current information.

In addition, the letter makes no reference to whether or not the return of Watkins' deposit was based on the President's Award. Watkins, as mentioned above, was fully aware that there remained a possibility that HDF would be allocated the vehicle if it won a Ford award in the future. Watkins' undisputed actions demonstrated that he waived his rights in the Contracts

D. The Appellate Court erred when it determined that the Contracts had not been abandoned. At page 33 of his Brief, Watkins states:

> The burden to prove "abandonment" of a contract does not involve substantially different or less rigorous standard of proof than does "waiver", as Henry Day Ford seems to imply in its present Brief – by presenting and arguing "abandonment" and "waiver as separate and distinct affirmative defenses.

As demonstrated above and below, waiver and abandonment, while similar, are two distinct claims. "Waiver" is defined as the voluntary and intentional relinquishment of a known right and "abandonment" is the intentional, unequivocal relinquishment of a benefit due from another.

Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App., 1988). Both claims have been argued separately throughout this litigation.

If there is a dispute whether abandonment has occurred, "it is usually a question of fact to be determined from the circumstances of the particular case, which include not only nonperformance, but also expressions of intent and other actions of the parties". Timpanogos Highlands, Inc. v. Harper, 544 P.2d 481, 484 (Utah 1975). In determining those facts and circumstances, the trial court is given "considerable latitude and should not be reversed unless the finding is clearly erroneous or if this Court is otherwise persuaded that a mistake has been made." *See also,* Adair v. Bracken, 745 P.2d 849, 851 (Utah Ct. App. 1987); *Utah Rule of Civ. P. 52(a).* The trial court's findings that the parties abandoned their contract will not be reversed "unless we are persuaded that the evidence clearly preponderates against the findings. Timpanogos Highlands, 544 P.2d at 484.

In this case, the trial court found that both parties had acted as if they had abandoned the Contracts.

> Plaintiff, by his acceptance of his deposit without reservation, objection, or condition, unequivocally demonstrated his abandonment of the Contracts.
>
> Plaintiff's demand that the Contracts be honored by defendant over two (2) years after plaintiff accepted a return of his deposit is unreasonable. The Court finds that defendant returned plaintiff's check in good faith and based upon the reasonable belief they would not be allotted any Ford GT 40's.
>
> Plaintiff, by his actions, unequivocally demonstrated his intent to relinquish his rights to purchase the subject vehicles from defendant.

(Trial Court Findings of Fact ¶¶, 40, 41, 42)

"[A] contract may be [abandoned] by acts or conduct of the parties inconsistent with the continued existence of the contract." Harris v. IES Assoc., Inc., 2003 UT App 112, ¶37, 69 P.3d 297 (internal quotations omitted.) In this case, both parties undertook acts inconsistent with the continued existence of the Contracts.

HDF acted inconsistently with the existence of the Contracts when it cancelled the Contracts and refunded the deposit/cash down given by Watkins as security for the performance of the Contracts. Watkins acted inconsistently with the Contracts when he accepted the return of his deposit and negotiated the check without objection or inquiry.

An intent to abandon "may be inferred from the acts and conduct of the parties" or "from the attendant circumstances". Parduhn v. Bennett, 2002 UT 93 ¶11, 61. P.2d 982.

Both parties demonstrated by their conduct and actions an unequivocal expression and intent to abandon the Contracts. Watkins' action of negotiating the check sent to him by HDF without reservation, question, or inquiry demonstrated unequivocally that he considered the Contracts cancelled and void. Watkins' actions were clearly inconsistent with the continued existence of the Contracts. *See generally*, Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 753 (Utah Ct. App. 1988) (stating that abandonment is the intentional relinquishment of one's right in the contract).

Watkins' silence by not contacting HDF upon receipt of the $2,000.00 check or at any other time prior to June 2005 also demonstrated Watkins' abandonment of the Contracts. Additionally, Watkins acted inconsistent with continuation of the Contracts when he, after receipt of the $2,000.00 check from HDF, began contacting other Ford dealers in an attempt to purchase a Ford

GT40 from other dealers. (Watkins Testimony, TT 53:4-23.)

The Trial Court correctly ruled that Watkins acquiesced to HDF's abandonment when he accepted the return of his deposit and negotiated the deposit check. Both parties had demonstrated by their conduct an unequivocal intent to abandon the Contracts. The conclusion by the Trial Court that the parties abandoned the Contract is supported by the evidence and is not clearly erroneous.

The circumstances of this case demonstrate that Watkins abandoned and relinquished his right to the Contracts. Thus, the Appellate Court should not have reversed unless it was persuaded that the evidence clearly preponderates against the findings of the Trial Court. However, the evidence, and the Trial Court's factual findings demonstrate that the parties mutually abandoned the Contracts.

POINT III: THE APPELLATE COURT ERRED WHEN IT DETERMINED THAT HDF BREACHED THE CONTRACTS.

As discussed in detail above, the Contracts specifically provided that Watkins contracted to purchase two (2) Ford GT40's. The Contracts represented what Watkins requested. Even if the name of the vehicle changed, Watkins did not request a modification of the Contracts to reflect a different model, though Watkins knew he had the right to make, and that he had in the past made, such a request.

The trial court concluded:

> The Court is required to interpret the parties' contracts based upon the plain meaning contained in the Contracts.
>
> The Contracts provided that defendant was to sell to plaintiff a "Ford GT 40".
>
> Defendant has not been allocated a Ford GT 40 and, as such, defendant did not

breach the parties' Contracts and, as such, plaintiff's Complaint must be dismissed.

(Trial Court Conclusions of Law ¶¶3, 4, 5.)

In this case, the Contracts are undisputedly clear. Watkins asked to purchase two (2) GT40's and, pursuant to Watkins' request, two (2) Contracts were prepared, read, and signed by Watkins. The Contracts represented the parties' bargain in every respect.

The Contracts at issue in this case fail to specify a time within which HDF would deliver the automobiles to Watkins. Accordingly, the trial court found:

> It was not until February 2004, over two years after plaintiff accepted the return of his deposit, that defendant learned that it would be allocated a Ford GT based upon defendant being awarded the Share of the Nation Award for the 2003 sales year.
>
> Plaintiff's demand that the Contracts be honored by defendant over two years after plaintiff accepted a return of his deposit is unreasonable. The Court find that defendant returned plaintiff's check in good faith and based upon its reasonable belief they would not be allotted any Ford GT 40's.

(Finding of Fact ¶¶29, 41.)

If a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances, and in case of controversy that is something for the trial court to determine. Watson v. Hatch, 728 P.2d 989, 990 (Utah 1986). Under the circumstances of this case the return of the deposits, which was not objected to by Watkins, was made in reasonable time and at that time the Contracts terminated. Since the Contracts are absent any indication that Watkins and HDF intended to hold the option open indefinitely, HDF submits that the Contracts contemplate that HDF was free to abandon the Contracts when it understood it would not be receiving any GT40s within a reasonable time.

POINT IV: THE APPELLATE COURT ERRED IN REVERSING THE TRIAL COURT'S DETERMINATION THAT WATKINS FAILED TO MITIGATE HIS DAMAGES.

Damages awarded for breach of contract should place the non breaching party in as good a position as if the contract had been performed. However, the non breaching party has an active duty to mitigate his damages, and he may not, either by action or inaction, aggravate the injury occasioned by the breach. Mahmood v. Ross, 1999 UT 104, P31, 990 P.2d 933. In order to satisfy the duty to mitigate damages, a non breaching party must make "reasonable efforts and expenditures." Madsen v. Murrey & Sons Co., 743 P.2d 1212, 1214 (Utah 1987).

In this case, Watkins was offered a Ford GT for MSRP. Watkins declined to purchase the vehicle (Watkins Testimony, TT 107:15-19) and thereby failed to mitigate his damages. Watkins argues in his brief that the Trial Court's Finding of Fact 39, which provides: "Plaintiff refused defendant's offer to purchase a Ford GT. Plaintiff's refusal to purchase the Ford GT constitutes a failure of plaintiff to mitigate his damages", amounts to a "conclusion of law" and should be accorded no deference by a court of appeal. (WB, pg. 47.)

The ***finding*** by the Trial Court is supported by the undisputed facts. Watkins testified that he intended to purchase the Ford GT40 in his name (Watkins Testimony, TT 90:16-18) and then sell the vehicle for a profit (Watkins Testimony, TT 90:19-25; 91:1-4). Watkins, however provided no evidence as to what he could actually sell a used GT40 for. Watkins only testified that he had a "list of people" who he could sell the car to (Watkins Testimony, TT 8-10). The "list" was known only to Watkins. (Watkins Testimony, TT 11-14.) At no time did Watkins present any evidence of any monetary or other damage he sustained as a result of not being able to purchase and resell

a Ford GT40. Therefore, the Appellate Court erred when it overturned the trial court's factual findings as to Watkins' failure to mitigate.

POINT V: HDF IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND COSTS.

In Utah, attorney's fees are awardable only if authorized by statute or by contract. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The Contracts provided:

> In the event it becomes necessary for Seller to enforce any of the terms, conditions or warranties in this agreement, Purchaser agrees to pay reasonable attorney's fees, court costs, and collection fees.

Utah Code Ann. §78B-5-826 provides:

> A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Clearly, the award of attorney's fees and costs by the trial court is supported by the Contracts and HDF should be awarded its attorney's fees and costs incurred on appeal.

CONCLUSION

Based upon testimony and evidence presented at trial, the Trial Court concluded:

The Contracts are clear and unambiguous and were intended to be the final and complete expression of the parties' bargains.

The Contracts between the parties are integrated agreements.

The Court finds the parties abandoned the Contracts.

Defendant did not breach the parties' Contracts and, as such, plaintiff's Complaint must be dismissed.

Defendant is awarded its reasonable attorney's fees and costs in an amount to be proven by Affidavit.

(Conclusions of Law ¶¶1, 2, 9, 11, 12)

The Trial Court's decisions were each supported by the evidence and the law. Based upon the foregoing, HDF requests this Court affirm the trial court's dismissal of Watkins' Complaint and award of attorney's fees and costs to HDF. HDF further requests that HDF be awarded its attorney's fees and costs incurred on appeal.

Finally, the flaw in the Appellate Court's decision can be addressed by the question could HDF have forced Watkins, three (3) years after the Contracts were written and over two(2) years after Watkins accepted the return of his deposit, to purchase a Ford GT when the contracts provided that Watkins had contracted to purchase a Ford GT40?

The Court of Appeals committed reversible error in not strictly limiting its review to the trial Court's proper interpretation of the Contracts.

RESPECTFULLY SUBMITTED this 5th day of August, 2011.

ROBERT W. HUGHES
Attorney for Appellant Henry Day Ford

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) bound copies and one (1) electronic copy of Appellee's Brief to P. Bryan Fishburn, 4505 South Wasatch Blvd. #215, Salt Lake City, Utah 84124, this 5th day of August, 2011.